INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Preliminary statement	1
Statutory provision sustaining jurisdiction of the Supreme Court of the United States	4
Statute of Arkansas the validity of which is involved	6
Date of judgment and application for appeal	7
Stage at which the Federal questions were raised	7
The Federal questions are substantial	8
The substantial Federal questions involved	8
Exhibit "A"—Opinion of the Supreme Court of the State of Arkansas	16

Table of Cases Cited.

Chicago, etc., R. Co. v. *Minnesota,* 134 U. S. 418, 33 L. Ed. 970	11
Chicago, etc., R. Co. v. *Wisconsin,* 238 U. S. 491, 59 L. Ed. 1423	11
City of Fort Smith v. *Department of Public Utilities,* 195 Ark. 513, 113 S. W. (2d) 100	2
Northern Pac. R. Co. v. *North Dakota,* 236 U. S. 585, 59 L. Ed. 735	11
Ohio Bell Tel. Co. v. *Comm.,* 301 U. S. 292, 81 L. Ed. 1093	11
San Diego Land Co. v. *National City,* 174 U. S. 739, 43 L. Ed. 1154	11
Southwestern Bell Telephone Co. v. *Lee et al.,* 140 S. W. (2d) 132	11
Southwestern Tel. & Tel. Co. v. *Danaher,* 238 U. S. 482, 35 Sup. Ct. 886, 59 L. Ed. 1419	9
Southwestern Tel. & Tel. Co. v. *Sharp & White,* 118 Ark. 541, 177 S. W. 25	12
Texas, etc., R. Co. v. *Abilene Cotton Oil Co.,* 240 U. S. 426, 51 L. Ed. 553	11

Page

Ward v. *Krinsky*, 259 U. S. 503, 42 Sup. Ct. 529, 66 L. Ed. 1033 6
West Ohio Gas Co. v. *Comm.*, 294 U. S. 63, 79 L. Ed. 761 11

STATUTES CITED.

Arkansas Public Utilities Act (Act 324, Laws of 1935), Sections 61 to 64 (Pope's Digest, Sections 2121 to 2124) 9, 12
Constitution of the United States, 14th Amendment 8, 9, 13
Judicial Code, Sections 234 as amended (28 U. S. C. A. 344) 4
Pope's Digest (Ark.):
Section 2064(e) 9
Section 2075 3
Section 14261 ..... 2, 3, 4, 6, 8, 9, 12, 13
United States Code, Title 28:
Sections 344(a) and (b) 6
Sections 861(a) and 861(b) 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 299

SOUTHWESTERN BELL TELEPHONE COMPANY,
Appellant,

vs.

CARRIE C. LEE,
Appellee.

STATEMENT IN SUPPORT OF THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Preliminary Statement.

With the object of a better understanding of this case, the appellant believes the recitation of a bit of historical matter in explanation of the record, although to some extent antedating it, may be helpful.

Several years ago, the appellant, in the conduct of its telephone utility business in Arkansas, commenced a campaign to enforce its Rule V-c, as it is generally known in the record. This rule reads:

> "USE OF CUSTOMER SERVICE—Customer telephone service, as distinguished from public and semi-public telephone service, is furnished only for use by the customer, his family, employees or business associates, or persons residing in the customer's household, except

> as the use of the service may be extended to joint users. The Telephone Company has the right to refuse to install customer service or to permit such a service to remain on premises of a public or semi-public character when the instrument is so located that the public in general or patrons of the customer may make use of the service. At such locations, however, customer service may be installed, provided the instrument is so located that it is not accessible for public use."

As a result of this campaign of enforcement, the City of Fort Smith enacted an ordinance which had the effect of setting aside the rule. This ordinance was validly enacted under the Arkansas Utilities Act establishing a dual form of utility regulation—a delegation of authority to regulate utilities, both to the cities, and to the State Commission, there called the Department of Public Utilities, with revisory control over city ordinances by the Department on what is commonly known as appeal.

The ordinance of the City of Fort Smith was appealed to the Department by the appellant here, and the Department found, after a considerable hearing, that the ordinance was unreasonable, and that the appellant's rule was reasonable, and the Department ordered the vigorous enforcement of the rule throughout the state (its opinion and order are in the record here). The validity of this order was affirmed, on appeal, by the Supreme Court of Arkansas. (*City of Fort Smith* v. *Department of Public Utilities*, 195 Ark. 513, 113 S. W. 2d 100). In order to avoid the penalties of the Utilities Act, appellant had no alternative save to enforce the rule, whereupon appellant was held liable for statutory penalties, under Section 14261, *infra*, on account of said enforcement.

The rule, by its clear terms, restricts the use of customer telephone service, under customer rates, to the customer, his family, his employees, and his business associates. If

service is wanted for others as well, the classification of service is no longer the customer classification, but is the semi-public classification, to which different rates apply as indicated in the appellant's filed tariffs which are in the record here.

This case originated in a written demand by the plaintiff below that, in substance, the appellant provide her with service of the semi-public classification (to which the rule would not apply), at the rate for service of the customer classification (to which the rule would apply). The appellant refused to comply with this written demand because to do so would be to violate the Arkansas Utilities Act requiring that the filed rates must not be departed from (Pope's Digest, Sec. 2075).

Thereupon the plaintiff below instituted this action for the recovery of penalties provided by the laws of Arkansas (Pope's Digest, Sec. 14261), reading:

> "Discrimination—Penalty. Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities without discrimination or partiality, within ten days after written demand therefor; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction, upon any such applicant that is not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business, by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under a penalty of one hundred dollars, and five dollars per day for each day from the expiration of said notice until said demand is complied with or suit is instituted for penalty for failure to comply with said demand, for such discrimi-

nation, after compliance or offer to comply with the reasonable regulations of such company and the time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused. And any person denied such telephone facilities shall also have the right to proceed by mandamus or other proper remedy to enforce the furnishing of same and the court shall hear such applications either in vacation or in term time and make such temporary orders relative to the furnishing of such facilities as the facts may justify, and may enforce compliance therewith, until such orders are vacated by order of the court or the judge at chambers, or such suit is finally determined."

The plaintiff's claim at the trial of the cause was, not that the rule was unreasonable, but that other customers were violating the appellant's rule, or were receiving service of the semi-public classification at the lower rate for the customer classification, and that the refusal of the appellant to violate the Utilities Act in his case, by providing semi-public service at the customer rate, subjected the appellant to the penalties of Section 14261.

The Supreme Court of Arkansas affirmed plaintiff's judgment by declaring the rule unreasonable in a collateral proceeding, although the same rule had been earlier declared reasonable by the regulatory tribunal.

Statutory Provision Sustaining Jurisdiction of the Supreme Court of the United States.

This Court has jurisdiction of this cause under Judicial Code, Section 237 as amended (28 U. S. C. A. 344), which provides:

"(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in

question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion award execution or remand the cause to the court from which it was removed by the writ.

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph." (R. S. Sections 690, 709; Mar. 3, 1911, c. 231, Sections 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, Sec. 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, Sections 1, 43 Stat. 937.)

28 U. S. C. A. Sections 344 (a) and 344 (b) and under 28 U. S. C. A., Sections 861 (a) and 861 (b):

> "(a) The writ of error in cases, civil or criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal (Jan. 31, 1928, c. 14, Sec. 1, 54 Stat. 54).
>
> "(b) The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which Section 861 (a) of this title substitutes for a writ of error. (Jan. 31, 1928, c. 14, Sec. 2, 45 Stat. 54, as amended April 26, 1928, c. 440, 45 Stat. 466.)"

Statute of Arkansas, Validity of Which is Involved.

The validity of the statute of Arkansas (Pope's Digest, sec. 14261, as interpreted in the decision of the Arkanass court in this cause, see *Ward* v. *Krinsky*, (1922) 259 U. S. 503, 42 S. Ct. 529, 66 L. Ed. 1033) is here involved. The statute has heretofore been quoted herein, verbatim.

There is further more involved herein the action of the Supreme Court of Arkansas in adjudging the appellant's aforesaid rule to be unreasonable, when it did so in a collateral action—without any statutory delegation of authority to perform this legislative function—and did so without any evidence to support its finding that the rule was unreasonable.

The only statute of Arkansas that could conceivably authorize the court so to act legislatively is the selfsame penalty statute, sec. 14261, and if it could be so construed, the validity of that statute is again challenged for its constitutional imperfections.

The appearance is that the Supreme Court of Arkansas acted legislatively in this case, in complete disregard of the

statutes, and without any statutory authority to act legislatively, whereas if it had had statutory authority to act as it did in this case, the validity of the statute under which it might have so acted would have also been here challenged and involved.

Date of Judgment and Application for Appeal.

The judgment sought to be reviewed was entered in the lower court on May 8, 1939, by the Supreme Court of Arkansas, the highest court of the State, on April 8, 1940, and appellant's petition for rehearing in the Supreme Court of Arkansas, was denied June 3, 1940. Application for appeal to the Supreme Court of the United States was presented and granted June 27, 1940.

Stage at Which the Federal Questions Were Raised.

The Federal questions (all involving the Federal constitution) were first raised on petition for rehearing, in the Supreme Court of Arkansas, except as the appellant in its briefs before said court undertook to demonstrate the unconstitutional consequences of such a decision as the court reached. These considerations were offered, however, not so much to raise questions of constitutionality, as to influence an interpretation of the penalty statute which would permit it to conform with the constitution. The appellant, under statutory injunction, particularly in view of the order of the regulatory body, was obliged to enforce its rule, and it could not have anticipated a decision that its rule would be declared unreasonable, and that it could be declared so in a collateral proceeding for the first time by an appellate court, without evidence, and without notice and hearing, and without any issue being tendered in the trial court. The constitutional questions were raised in the petition for rehearing, in substantially the same language as contained in the accompanying assignments of errors. Appel-

lant had no earlier opportunity to raise the Federal questions.

The Supreme Court of Arkansas disposed of the Federal questions so raised in the petition for rehearing by denying the petition without comment by *per curiam* opinion dated June 3, 1940.

The Federal Questions Are Substantial.

All of the Federal questions here raised have to do with the invasions of the appellant's rights vouchsafed by the 14th Amendment to the Constitution of the United States; and as such all these questions are substantial.

The Substantial Federal Questions Involved.

1. The court so construed the penalty statute under the circumstances of this case, as to deprive appellant of its property.

At no time in the trial of the case in the circuit court, nor in the briefs presenting the case to the Supreme Court of Arkansas, was the reasonableness of the appellant's rule V-c questioned, even if we indulge the rash assumption that it could be questioned in a collateral proceeding. Not until the decision of the Supreme Court of Arkansas did appellant apprehend that there was, or could be, any contention that the rule was unreasonable, or that by any chance such an interpretation could be put upon it in this case.

Under these circumstances, the assessment of penalties, although the appellant in good faith sought to enforce said rule in obedience to the order of the Department of Public Utilities, amounts to a construction of the penalty statute, Section 14261, so as to take appellant's property without due process of law and deny to it the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States. In an analogous case, almost a dead

parallel, where the predecessor of this appellant was enforcing a rule which it had every reason to believe was reasonable, this Court reversed the judgment of the Supreme Court of Arkansas, which had held the rule unreasonable and had allowed penalties against appellant, for the reason that the penalty statute, Section 14261, was so construed as to deprive appellant of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States. *Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U. S. 482, 35 S. Ct. 886, 59 L. Ed. 1419.

2. The court in its pretended exercise of legislative authority acted so as to deny due process to appellant.

The action of the Arkansas court in declaring the appellant's rule unreasonable deprived the appellant, in a strange way, of due process of law in the fixing of a rate for utility service.

The regulation of the rates of public utilities is a legislative process. The upsetting of the appellant's rule defining the amount of service to be provided for the established rate necessarily constitutes a rate order. Every rule affecting a rate is a part of the rate—and so specifically says the statute of Arkansas in its definition of "rate" (Sec. 2064 (e) Pope's Digest).

The legislative regulatory power in this day is customarily delegated to administrative commissions with provision for judicial review of the lawfulness of their orders by direct proceedings in the courts. This is the procedure established by the Arkansas Utilities Act (Act 324, Laws of 1935). The legislative power is delegated to the Department of Public Utilities, and the courts are invested with jurisdiction in a direct proceeding to determine whether the Department "has regularly pursued its authority". The statute (clearly enough, it would seem) does not delegate any legislative authority to the courts, but confines

their jurisdiction to a simple yea or nay answer to the question of the Department's order having been reached in accordance with its statutory authority.

The jurisdiction of the Department legislatively to determine the reasonableness of the appellant's rule was invoked some two years before the case at bar was brought, and, after hearing, the Department confirmed its reasonableness and ordered the rule enforced. Upon appeal, eventually reaching the Supreme Court of Arkansas, that court sustained the order of the Department as validly made in its legislative capacity. (*Ft. Smith* case, *supra.*) The court in that case was, however, not concerned with the reasonableness of the rule, since it had not been claimed that the Department exceeded its statutory authority to prescribe only reasonable rules.

Under the circumstances, in the case at bar, the action of the Supreme Court of Arkansas in adjudging the appellant's rule to be unreasonable effects a deprivation of appellant's property without due process of law contrary to the 14th Amendment in two ways:

(a) The court essays a legislative act, without any delegated authority so to act, and employs its judicial power of execution of its judgments to enforce its spurious legislative order. This procedure so offends the traditionally accepted concepts of the orderly processes of law as to constitute a taking without due process. Due process of law, in its simplest meaning, cannot embrace the unexpected promulgation of a legislative order by a judicial tribunal without delegated legislative authority, followed by the judicial execution of the legislative order against the property of the appellant.

(b) If it be assumed that the Supreme Court of Arkansas, by some non-existent statute, possesses legislative power to regulate utility rates, then the exercise of that power by the court in this case denies the appellant due process of law.

The appellant was afforded no notice of attack, even the forbidden collateral attack (*Texas, etc. R. Co.* v. *Abilene Cotton Oil Co.*, 240 U. S. 426, 51 L. Ed. 553) on the reasonableness of its rule, nor any hearing thereon. The Arkansas court in its own opinion (140 S. W. 2d 132, 134) conceded that the issue of reasonableness had not been tendered at the trial. And consequently, of course, no evidence of the reasonableness of the rule was offered. The Supreme Court of Arkansas, accordingly, annulled the appellant's rule, which had been held reasonable and ordered enforced by the valid order of the regulatory Department, without evidence, without notice, and without hearing. This action amounts to a clear contravention of the 14th Amendment under authority of:

Chicago, etc. R. Co. v. *Minnesota*, 134 U. S. 418, 33 L. Ed. 970;

San Diego Land Co. v. *National City*, 174 U. S. 739, 43 L. Ed. 1154, (Ohio case—Cardozo opinion);

West Ohio Gas Co. v. *Comm.*, 294 U. S. 63, 79 L. Ed. 761;

Ohio Bell Tele. Co. v. *Comm.*, 301 U. S. 292, 81 L. Ed. 1093.

Without such opportunity for hearing, the appellant was unable to present its potential claims that the ultimate declaration of the unreasonableness of the rule would effect a taking of its property without due process of law by requiring the provision of free service to the non-customer classification:

Northern Pac. R. Co. v. *North Dakota*, 236 U. S. 585, 59 L. Ed. 735;

and by requiring the appellant to forsake its constitutional property right to establish itself reasonable classifications of service, and reasonable rates applicable thereto:

Chicago, etc. R. Co. v. *Wisconsin*, 238 U. S. 491, 59 L. Ed. 1423.

3. The court's decision effects a taking of appellant's property without due process in any event.

In the contingency that it might sometime be contended that this case might be construed as having been decided on a non-Federal ground, namely, on the ground of a discriminatory application of a reasonable rule, the appellant considers it essential to emphasize that such could not possibly be the case. Except as the rule is declared unreasonable, the case would be governed by the decision of the Arkansas court in *Southwestern Tel. & Tel. Co.* v. *Sharp & White*, 118 Ark. 541, 177 S. W. 25, which is nowhere overruled in the opinion here, but which is indeed cited in this very opinion with approval.

In addition, if the decision of the Arkansas court should be considered from the assumption that the rule was declared reasonable, rather than unreasonable, the decision holding appellant liable for penalties, when appellant was enforcing a tariff rule which it had been ordered to enforce by the Arkansas Department of Public Utilities, places appellant in the anomalous and inequitable position where, if it complies with the order of the Department of Public Utilities, it becomes liable for the statutory penalty under Section 14261 of Pope's Digest, whereas, if it ignores the order of the Department of Public Utilities, in order to avoid penalties under Section 14261, it then becomes liable for penalties fixed by Sections 61 to 64 of the Public Utilities Act of Arkansas (Pope's Digest, Sections 2121 to 2124) for violation of the orders of said Department. Appellant is thus placed in a situation where it is liable for penalties whichever course it takes, with no way of escape. Under this decision, the compliance with one statute would produce the violation of another, with resulting penalties. Even if, (contrary to the record), appellant had violated the Utilities Act

in deliberately permitting some customers to receive service at less than tariff rates, appellant would not, in the opinion herein, be permitted to mend its ways and to comply with said Act in order to avoid penalties under Section 14261, *supra*. Thus appellant would be denied the equal protection of the laws and its property would be taken without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, in being compelled to multiply its criminal offenses under the Utilities Act.

The effect of the opinion and decision is to penalize appellant for enforcing an order of the State regulatory commission at the first place that it encounters a violation, on the ground that enforcement of the order might have been started elsewhere. Appellant is under the duty and has the right to comply with said order wherever it finds violations thereof, without liability for penalties under Section 14261, *supra*, and to violate its duty and take away appellant's right deprives appellant without due process of law and denies it the equal protection of the law.

The appellant is held liable for penalties in the face of the conceded fact that appellee was offered the service described at the only lawful rate, i. e., the filed tariff rate, but refused such a service. The opinion and decision thus holds that appellee, in order to recover penalties, does not have to comply with the reasonable rules and regulations of appellant, in spite of the fact that Section 14261, the penalty statute, makes such requirement of appellee before penalties can be recovered. Reading out of and nullifying the provision requiring compliance or offer to comply with the reasonable rules and regulations of the telephone company, interprets and construes the penalty statute, Sec. 14261, *supra*, so as to make it unreasonable, arbitrary and oppressive and causes it to operate to deprive appellant of its property without

due process of law and to deny to it the equal protection of the law.

Penalties were assessed against the appellant because the court found that other customers of appellant were violating their contracts with appellant and thereby violating the tariff rule which appellant sought to enforce against appellee. The rule, as are all tariff rules of appellant, is a part of appellant's contracts with its subscribers. There was no evidence that appellant knew of such violations by any customer until they so testified from the witness stand, but all the evidence pointed to the fact that appellant was vigorously and energetically enforcing the rule wherever violations came to its attention. In view of the fact that these violations occurring on the customer's premises were unknown to appellant, and since appellant was entitled to rely upon its customers to perform their contracts with appellant, for the court to hold appellant liable for penalties for discrimination for not permitting appellee to so violate the tariff rule is to interpret the penalty statute, Section 14261, *supra*, so as to deprive appellant of its property without due process of law and deny it the equal protection of the law. Under this interpretation of the penalty statute it is impossible for appellant to avoid penalties by reason of the derelictions of its customeres except by forsaking its right to establish reasonable classifications, reasonable rules and regulations, and reasonable rates. The imposition of either alternative deprives appellant of its property without due process of law.

Of necessity, under the foregoing circumstances, appellant raised the Federal questions in its petition for rehearing to the Supreme Court of the State of Arkansas, since no Federal questions appeared in the case until the decision of that court. The Federal questions were disposed of by

the *per curiam* opinion of June 3, 1940, denying the petition for rehearing.

The opinion of the Supreme Court of Arkansas is appended hereto.

Respectfully submitted,

(S.) BERNAL SEAMSTER,
JOHN MOHLER,
BLAKE DOWNIE,
EDW. B. DOWNIE,
Attorneys for Appellant.

EXHIBIT "A".

No. 234.

In the Supreme Court of Arkansas, April 8, 1940.

SOUTHWESTERN BELL TELE. CO.

vs.

LEE AND HANNA.

BAKER, *J.*:

The two cases as above styled have been combined for disposition of the appeals in one opinion. The general facts in each case are very similar; the defense raises the same general issues in both cases. Whatever distinguishing characteristics there may be will be set forth in our discussion. In each case the appellee filed suit to recover penalties, as provided for in section 14261 of Pope's Digest, each charging that there had been discrimination by the telephone company against the plaintiff in not rendering the same flat rate service by the installation of business telephones for which application had been made, as was rendered to other people or customers in like situation in the same community. Mrs. Lee was operating a cafeteria on the campus of the State University at Fayetteville. During the summer of 1938, in order to save expenses while there was no school in session she asked that her telephone be discontinued, or, she be given the vacation rate, which meant that the telephone be disconnected, but not be removed, and that during that vacation she would pay a half rate in order to retain the telephone she had been using and to keep her old or original telephone number. This arrangement, as we understand, would not in any way release her from her contractual obligation to keep the telephone, but was merely a convenient arrangement whereby she paid a half rate without any service at all, but which assured her immediate connection upon her return at the beginning or opening of the University. On September 7th, at school opening, she asked that the telephone be con-

nected and service be restored. The telephone company at that time refused to restore this service for the reason, it contended, there had been a new classification of telephone service; that the service that she had prior thereto in the use of her telephone, where it was then located, near her table or desk, or cashier's stand, was not then available at the old contract price of $3.50; but that such telephone, which was so located that students at the University who patronized her place of business might use it, would be put in service or operation again at a new rate of $10.50 per month. The company refused to connect up the telephone as then located without an agreement to pay that price. There was offered to her what was designated as a different class of service; that is to say, if she would permit the company to locate the telephone in her kitchen or conceal it under a counter, or put it in a show case, where it was not readily accessible for her patrons, the students, it would then be put in operation for the price of $3.50 per month, as the rental charge had been prior to her vacation. The telephone company says that she refused to agree to this. Her testimony was equally as positive that she did finally agree to this arrangement. She insisted, however, that she should have the same kind of service that she claims was rendered to other business houses or concerns in the city, at the flat rate of $3.50, where customers of subscribers for the telephone service might make use of the telephone when they desired to do so. The company relied upon a rule which was offered in evidence and which has been identified as Rule C:

"Use of Customer Service—Customer telephone service, as distinguished from public and semi-public telephone service, is furnished only for use by the customer, his family, employees or business associates, or persons residing in the customer's household, except as the use of the service may be extended to joint users. The Telephone Company has the right to refuse to install customer service or to permit such service to remain on premises of a public or semi-public character when the instrument is so located that the public in general or patrons of the customer may make use of the service. At such locations, however, cus-

tomer service may be installed, provided the instrument is so located that it is not accessible for public use."

Although Mrs. Lee agreed, according to her testimony, that she would abide by and conform to Rule C and, permit the installation of the telephone under a counter or in a show case, the managing employees of the appellant company, in addition to the requirements of the rule, then demanded of her that she refuse permission to the students or patrons of her place of business to use the telephone. They say the reason they refused then to install the telephone is that she quite frankly told these managing agents for the telephone company that she would not deny or refuse the use of the telephone to anyone who might request its use as located either under a counter or in the show case and for that reason only they did not install the telephone.

This is not the first time that we have seen this rule, but it is the first occasion on which the requirements of the rule and the reasonableness thereof have been presented for our consideration. City of Fort Smith *v.* Dept. of Public Utilities, 195 Ark. 513, 518.

After mentioning the rule and the power of the department to enforce rules, we said: "We are not now concerned with the reasonableness of said rule and do not so decide."

We are by no means forgetful that appellant has argued the issues upon this appeal solely upon matters of questions of fact, asserting and assuming as they apparently have a right to do so, under the record in this case, that because the reasonableness of the foregoing rule was not questioned by appellee, it may not properly be so considered in this litigation. This is so contended on account of the fact that both in the Lee case and in the Hanna case, counsel for the appellees have argued that the cases may be settled upon questions of fact duly presented without a consideration or determination on the part of this court of the reasonableness of the rule offered as a part of appellant's defense.

Ordinarily we would feel ourselves bound by such limitations as the plaintiffs themselves may have felt impelled to

recognize in the decision of any rights they may have asserted in any matter wherein those rights were purely personal or individual.

In this matter, however, there are more than individual rights involved. The telephone company is a public service utility, having a monopoly of the service it renders in Fayetteville, where these suits originated and whatever rules it may announce must be considered not as an all-controlling force, or to possess the nature of a statutory enactment, but as regulatory, merely, of the business of the corporation and that such regulation must be considered as coupled inseparably, always, with the public interests. Therefore, if rules are not reasonable they may not be regarded as enforcible, or as affecting the rights of those who deal with the telephone company.

In this first case there is a sharp issue of fact, settled by the verdict of the jury as against the contentions of the telephone company, its insistence being that Mrs. Lee refused every form of classified service that it tendered to her; that it offered to her the ordinary business phone at $3.50, to be secreted or hidden under a counter, or in a show case, or in a box or cabinet which the company would provide at its own expense. Such instrument was for the exclusive use of herself and members of her family and her organization; that she refused to accept this service. On the other hand she testified quite differently, and the jury accepted her contention, that she agreed to accept what is known to be the business telephone to be installed by the company at a place inconvenient for public use, but at some place near the cashier's stand, but refused to have it located in her kitchen, because of the fact that she had to remain at the stand and take care of the business and could not go to the kitchen or other parts of the building to answer the telephone without possible loss or interruption in her usual business transactions, or, unless she employed extra help in some respects in regard thereto. It is her contention that she misunderstood the arrangement whereby there was installed a telephone as she had had it prior to the summer vacation and that when she had determined that the price charged was $10.50 she immediately asked that it be re-

moved and the ordinary business phone be restored at $3.50 and that she offered to comply with the reasonable rules and regulations of the company, even including the requirement that the telephone be placed under a counter, in a show case, or in a compartment. The dispute in this regard is that the telephone company insists now that it was not installed because she did not agree or promise to refuse permission to students to use the telephone in a new location, though she did agree to conform with all reasonable rules and regulations of the company. No examination of the foregoing rule will disclose that she should act as a guard for the telephone company to prevent the use of the telephone, nor is there anything in this entire record presented to us upon this appeal indicating that there had ever been a grant of power to the agents of the telephone company to exact a promise from her, in addition to one to abide by the reasonable rules and regulations of the company, as a condition precedent to the establishment of a telephone in her place of business.

There is evidence on the other hand that there were other places of business in the city of Fayetteville, wherein business telephones were installed and freely used by the customers of the subscriber having the telephone. For instance, we are told that in the bookstore at the University, patronized by pupils, there was a telephone installed for their use and another near the working desk, or place of business of the owner for his individual use and that he paid for and the company accepted the monthly rentals for these two telephones.

There is evidence that other places of business, drug stores and other mercantile establishments had telephones accessible to their patrons and customers who would use them as might be convenient.

There was, no doubt, some telephones in use in the city of Fayetteville as were those in use at the bookstore, but, it is argued that such places have not yet been reached in the correction of such abuses by the enforcement of the rule above mentioned; that as new telephones were required and installed from and after the time of the adoption of the rule and its approval by the utilities commission, no tele-

hones had been installed except in compliance with the rule, nd it is further argued that because of the fact that some ubscribers violated the rule others were not justified in oing so. The company argues also that the telephone in he bookstore, however, is not one operating under like ituation as that demanded by Mrs. Lee, the distinctive haracteristic being that the bookstore had operated its elephones and paid for this service for a period of six or even years; that in some of the drugstores they had re- uired that the telephones should not be located in places uite so convenient to the public as they had been during he years prior thereto. The full facts when developed show, however, that the standard business telephone in the town of Fayetteville was a $3.50 telephone, such as Mrs. Lee had had prior to the time of her vacation, such as had been operated in the bookstore, as a typical example, and other places of business in the city, one of which was a filling station. It is argued most earnestly in this case that these were not customers who were in like situation as that of Mrs. Lee and who should have been dealt with as they were dealing with her. We have given full consideration to all matters that have been introduced upon the particular distinguishing characteristics which the appellant company has already presented by its somewhat voluminous briefs, also, by oral argument of counsel, and we have yet to find what amounts to a substantial difference in Mrs. Lee's cafe, where she had demanded a telephone and in the bookstore, or the filling station. It is argued, and we understand it to be true, that Mrs. Lee's best customers were the students at the State University. We now suggest that there has not been abstracted in either one of the cases one line of testimony showing what the practice of the students at the University is in the use of the telephones. There is no proof whether they may have put in as many as five calls a day or five hundred. There is no proof in the entire record that the use of these telephones by the students tended to any extent, or any degree, to reduce, impair, or otherwise to disorganize the telephone service, nor is there any proof that the free use of the telephone by any students added to the expense of the telephone company. In truth, if a presumption should be indulged it must be against such a con-

tention, for the reason that the telephone established in the bookstore was for the free use of the pupils and that there was no complaint made on account thereof, nor of any evil effects or consequences that may have followed the free use of the telephone by the pupils. It must have been available where it had been installed for that purpose in the bookstore, nor is there any evidence that the pupils used these telephones at any location to any greater extent with any more frequency, or any less propriety than they used the telephone in the drugstore or in the filling station.

We have considered these facts rather fully, giving full effect to the contentions made by the appellant and have come to the conclusion that the distinction of difference in the classification offered to Mrs. Lee or to Mr. Hanna, under the said facts must be determined from the undisputed testimony to be as follows:

The telephone company says three classes of service were offered to Mrs. Lee, but were not available to Mr. Hanna.

(1) A telephone so located all her customers could make use thereof where she desired to have it placed a price of $10.50 per month was demended.

This was the same telephone service that she had enjoyed prior to the vacation for which she had paid $3.50. This was the same telephone service available at the bookstore, put in for the free use of the pupils, for which there was a charge of $3.50. This was the same telephone service available at most of the stores and at business houses for $3.50 per month. So this service may be regarded as the standard service of that community, one for which they charged everybody except appellees $3.50 and for which they were wanting to charge appellee, Mrs. Lee, $10.50. The other classified service they offered her was the same kind of telephone, secreted in the showcase, under a counter, or in a compartment, furnished by the company. This then was a substandard service for which they desired to charge this appellee $3.50. The other was a coin box service which could be operated only by the deposit of 5¢ for each call. The owner of the place of business and the subscriber to this telephone had to guarantee a rate substantially the same as

for the standard service, but he might get back as commission 20% over and above $3.30, the amount of the guarantee. As explained this coin box service was a kind of pay-call service, by which each person desiring to use the telephone paid to the telephone company for each call when made; and, the owner of the place of business, where it is installed furnished a place for installation, rent free. These were essentially the facts in the Lee case.

We shall proceed now to state any particular facts relating solely to the Hanna case before stating our conclusions.

At the time the Hanna case was tried appellant's witnesses testified that when they were negotiating with Mr. Hanna he had a coin box instrument or telephone in his place of business. He ordered it removed and this was on the last day it was in use. The agents for the telephone company testified that they offered to leave this telephone instrument in the place of business, upon the subscriber's guarantee of 11¢ a day, with further agreement that any amount received over $3.30 would be subject to a commission of 20%, to be paid to the subscriber, but this was not satisfactory to Mr. Hanna. Mr. Jaggers, who says he was the commercial representative of the telephone company, stated "the $10.50 rate wasn't available at that time, but every available service was offered to the plaintiff". He was offered a coin box telephone or a flat rate telephone where it wasn't accessible to the public, but ordered the coin box telephone removed on that day, May 4th. At that time it must appear, therefore, that the telephone company had only two alleged types of service which it could offer to its customers, the one was the so-called coin box type, which cost 5¢ for each call made over it, and the other was the ordinary, conventional, regulation, or standard type, then in use in all business houses in the city, but the service which the company insisted upon impairing so as to make it less convenient for the public, and, of course, more inconvenient for the subscriber, if he accepted that type of service, and no choice was left to him, in that regard, for he must either take the coin box machine or the impaired standard service. The regulation or standard type service at three times the regular price, $10.50, had not then been conceived.

In appellant's briefs, the arguments stand out that the defendant distinguished the types of service rendered by the amounts paid therefor, and what had been and was the usual type of service, the kind that had been in use prior to that date as a kind of standard or convential, or regulation on service as had always been tendered to, and was used by all business houses was still in common or ordinary use, some businesses having as many as two telephones put in, one out in the open, easily accessible to the public, located and put in by the telephone company for the use of the public, established and paid for by the business houses. At the time of the trial many of these were still in use and operation, just as they had been for a number of years, and the principal distinguishing differences as between these so long in use and the kind demanded by Mrs. Lee and by Mr. Hanna was that those already in use had been there many years. The price for all of these was and had been for a long time $3.50 per month. Notwithstanding the fact that this was a recognized standard service, what was offered to the appellee was the use of exactly the same kind of appliance with exactly the same facilities as was employed in other places of business, a notable example of which was the bookstore, and notwithstanding the fact that the price had never been over and above $3.50, this same service was not extended to Mrs. Lee, except upon a contract for the payment of $10.50 therefor. The telephone company refused to restore this standard service for Mrs. Lee or for Hanna who were both engaged in the restaurant business and who were patronized by students from the State University, unless these two subscribers who were demanding service would permit the telephone instruments to be installed in the kitchen or under a counter, or in a showcase or some place where it was inconvenient for the use of the public and in each of these instances inconvenient for the use of those who desired the service. The agents for the telephone company by their evidence argued that the standard type of service, when installed is for the sole use of the subscriber, whom they call a customer, and the members of his family and his employees, or members of the business organization. They argue also that if such customer permits

someone else to use the telephone he violates a contract made for the installation of the instrument. Such is the contention of the appellant company and because that condition was not upheld by the trial court, the appeal in these two cases is for the purpose of setting aside and overturning the judgments of the trial court. If under all the circumstances the contention is reasonable, based on a fair and natural classification of those who subscribed for and used telephones, we think it becomes our duty to uphold such contention as an established rule of the company, but, if, on the other hand, the distinction or so-called classification is artificial, arbitrary and without any sound basis in fact, the law will not support it.

In the presentation of our conclusions reached upon a full consideration of all the matters presented in this record, we say by way of premise, that not one line of testimony has been abstracted showing that telephones located in any place accessible to the students of the University has been subjected to any excessive use, not even the one located in the bookstore at the University, nor is there a word of testimony that a great number of calls over the telephone system would cost the telephone company any more than a few or half dozen calls in the same length of time, nor is there a word of proof that even though the students at the University made frequent and constant use of the telephones that may have been so installed for their exclusive use, such use has impaired to any extent the uses of services demanded by others from the same utility. Therefore, we think that the contention of the telephone company and its local agents that each telephone is located for the sole and exclusive use of the subscriber, the members of his family, and his employees, unreasonable, inasmuch as it fails to give consideration to the physical properties or mechanics of the telephone as well as the usual and ordinary controlling purpose of those who install such instruments in their places of business. Telephones are not like typewriters or cash registers in a place of business, used only by those engaged there. Telephonic instruments belong to the utility and they are installed for regular monthly rentals or charges, and the full monthly rentals are charged and paid

ordinarily without any deduction for "timeout" or "bad order". This fact is mentioned because the telephone is a two-way appliance, a means of communication between two people widely, or actually separated from each other. The purpose is to furnish immediate contact, whether the parties are separated merely by a block or so or by a greater distance of a mile or more. It is presumed to be an open channel of communication every minute of the day and hundreds of calls would not consume or use up any part of it, nor would this great number of calls tend to impair in the least the service.

Another interesting phase of telephone technique is wholly ignored by these agents of the telephone company and yet it is a factor upon which, to a great extent, the business of the telephone company must rely for its support. All that has been argued here as a reason for the rule, is customer's service. A fine example of that would be in a home where a mother cares for several small children. She desires and demands a telephone so that she can call the doctor immediately, if needed, and also that she may do her shopping without leaving her children unattended, but the doctor she calls, or the grocer, or the meat market, or the milkman had their telephones installed, not for the calls they might want to make, but rather for the reason that they might receive the calls of those who desire their wares. We do not know what degree or percentage of people who install telephones do so, so that their customers might be able to call them, but we venture to say a very large percentage of them do. While merchants and other businesses sometimes use telephones to call people in the transaction of business their controlling idea is to accommodate those who patronize them and to furnish to their customers an immediate means of communication so that they may profit by sales of their goods, wares and merchandise; so, it must appear that any limitation upon calls made over the telephone system is a limitation upon the service paid for by the ordinary business man who has installed the telephone to receive calls from those who want to buy his merchandise or by the doctor who wants his patients to be able to contact him immediately.

We think it must appear, therefore, that the agents of the telephone company who sought so assiduously to avoid rendering a free service to the University students are denying to a large number of subscribers or patrons of the telephone company the right to receive calls no doubt contemplated. No University student ever put in a call, even though unauthorized by the customer subscribing for the telephone, without at the same time calling a number paid for by another customer and whose telephone was perhaps installed for the very purpose of receiving such communications.

So it must appear, we think, that the classification intended to be made by the telephone company, or its agents, is without a sound basis, in fact or reason, and instead of rendering to new subscribers the same standard service that has been tendered to others and which each of these appellee subscribers has heretofore received for the price of $3.50 a month, and now to refuse that service except upon the payment of three times that sum, $10.50, is an unwarranted, unjust and unfair discrimination; or, on the other hand, so to impair that service by placing the telephone in the kitchen, or under a counter, or in a showcase, as to make it inconvenient to reach, and inaccessible, except by added trouble, and so to reduce what has heretofore been a standard, conventional or regulation service, and on account of that inferior and defective service charge, what is regularly charged to all other business enterprises for a service not so hampered or impaired, must also appear to be a discrimination. Appellant company has cited for our consideration the case of Southwestern Tel. & Tel. Co. *v.* Sharp and White, 118 Ark. 541, 177 S. W. 25, as authority in this case. We accept the announcements made in that case which are to the effect that the telephone company has the right to make all reasonable rules and regulations for the operation and control of its business, and those who deal with it must comply with such reasonable rules and regulations, but this announcement may not be taken as an unlimited authority on the part of the telephone company to announce a rule, the effect of which would result in reducing, impairing, or rendering an inferior service with the same appliances and facilities used

in rendering the standard or regular service, and thereby defeat the effect of regulatory statutes. The public has the right to demand and receive the best available service and no public utility has the right to choose, arbitrarily, to render an inferior service, or a sub-standard service merely to inconvenience those from whom they are unable to exact potential fees or charges that might otherwise be collected. It is possibly true, we do not know, that the student body at the State University is a potential source of revenue to the telephone company, if it could so regulate its business affairs that it would be able to collect from those who temporarily reside in University quarters, but that fact furnishes no basis or reason to deny an equally efficient service to those engaged in business there, because their principal customers are students of the University, nor may they require such business people to collect from the students the potential income they are otherwise unable to get by usual and approved methods of dealing.

It is argued that the book seller, or the filling station operator is not one in like situation with either of the appellees in this case. It is true that perhaps no two places of business in the city of Fayetteville are identical in all respects and that if the term "in like situation" be pursued to an ultimate conclusion, then every business house in the city of Fayetteville would form a separate and distinctive class. The statute intended no such specious reasoning. The organization operating the telephone system in Fayetteville must not be forgetful of the fact that the State University is the city's greatest institution; that without it few telephones would be in use and that those who now pay their regular monthly sums for the maintenance and support of this telephone system would no longer need to do so.

This is not the first occasion upon which we have given consideration to the rights of the subscriber or user of the telephone in his relation to other subscribers or users. Indeed, in a recent case the principal complaint was that the plaintiff was the object of a discrimination in that he was denied the use of some of the facilities of the telephone company, though he was given the right to a physical connection or right to make calls over the telephone system. After having copied in full Sec. 14261 of Pope's Digest, we said:

"It does not answer the requirements of the law, we think, merely to extend to one who has applied for service, telephone connection only. The telephone company has made us conscious of the facilities within its control of directory value and proper listing of subscribers, not according to consecutive numbers, but by an alphabetical arrangement of names, so that any particular person or business concern, among all of the subscribers or users of telephone service, may be promptly reached without undue trouble or delay." S. W. Bell Tel. Co. *v.* Matlock, 195 Ark. 159, 111 S. W. 2d 500.

Other remarks in the same opinion no less pertinent we think deny the right to anyone who recognizes the telephone as an instrument whereby the subscriber or customer may be reached or called rather than one for his exclusive use in calling other persons. In truth, we held in that case that discrimination might consist in a refusal to list in the directory one who made proper application therefor, provided that one was willing to abide by reasonable rules and regulations of the company.

Such was the decision of this court in the Yancy case. In that case, although Mr. Yancy had a residence telephone, he was required to go to the central office of the exchange and pay cash in advance before it would permit him to use long distance communication. It was also held in that same case that the telephone company could exact pay in advance as was decided in the Sharp and White case, supra. Yancy *v.* Batesville Tel. Co., 81 Ark. 486, 99 S. W. 679.

So the discrimination determined in that case consisted in failing to render to Yancy the same service available to others, a discrimination in quality or kind of service, but not because of any effort to make sure of payment therefor.

In the cases discussed, as in this opinion so far, we have given due emphasis to the fact that the customer or subscriber for service must evince a willingness to conform to or abide by the reasonable regulations or rules of the company. In this regard we call attention to two matters. The rule in this case was one that was promulgated by the company, though the appellant argues that it is a rule of Department of Public Utilities. There were rules and regulations promulgated by such utility corporations before such commissions were functioning and these were no less

binding than the ones promulgated at the present time, even after the approval of the commission. S. W. Tel. & Tel. Co. *v.* Sharp and White, supra; Yancy *v.* Batesville Tel. Co., supra.

The point we now make is that such regulations may not be ignored but must be observed by the corporation proclaiming them. The corporation certainly may not ignore such rules as to some customers and observe them as to others. If any rule may be so enforced, then the telephone company has the power to abrogate and nullify statutes intended to prevent discrimination. Certainly, if the telephone company elects to enforce a rule, there arises at once a discrimination as between those who already have it and the new subscriber or applicant.

There is little force in the argument offered in defense that the company may not be able to change all telephones immediately but a reasonable time must be given within which the changes will be made as they are reached in the usual and ordinary course of business. However reasonable the argument may sound, it violates well known practical operations of all telephone companies. Most of us have seen storms break down telephone lines, sleet and ice almost totally disrupt the service, yet within a few days the entire system be reworked and restored reasonably to ordinary capacity. In truth, the evidence in this case shows that the two businesses are the only ones who have been denied service, not solely because they refused to abide by the rules, but because the telephone company exacted more of them than the rules required,—express promises that they actively seek to prevent the use of the telephone by any non-subscriber. Such was the declaration of the witnesses in the Lee case, and surely no other conclusion can be reached from the proof.

In the Hanna case the telephone company had determined that Hanna should continue in the use of the coin box instrument. It had not then conceived the idea of a triple charge for the standard business telephone installed at a place selected by the customer or subscriber. There is no proof of another instance like this in the city of Fayetteville.

In a recent case we held that a telephone company might not make unreasonable requirements as a condition precedent to the rendition of the service. Southeast Ark. Tel. Co. *v.* Allen, 191 Ark. 520, 524. We said therein: "Appellee offered to comply with this rule. He says he was prevented from doing so by a requirement that he surrender his right to sue for penalties accruing to him by reason of alleged discrimination. The telephone company did not have a right to require him to yield or surrender any claim for penalties or a condition upon which it would render him the service."

There is some evidence that in a few instances the telephone company has by permission, moved some instruments and placed them in showcases or under counters, but there are other instances wherein there is the patent disregard by the company for the alleged rule in that there is the establishment and maintenance of telephones for public use in many business houses.

Besides the fact we think appellant's classification is arbitrary and artificial, we also hold that any interpretation of the rules adopted which permits discriminations or apparently furnishes an excuse therefor by way of defense is in violation of the appropriate statute. Section 14261 of Pope's Digest.

It follows that the judgments in both cases should be affirmed. It is so ordered.

Smith and McHaney, JJ., dissent.